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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA

10 COLUMBIA PICTURES INDUSTRIES, ) CV 06-05578 SVW (JCx)  
11 INC., *et al.*, )  
12 Plaintiffs, ) ORDER re PLAINTIFFS' MOTION FOR  
13 v. ) SUMMARY JUDGMENT ON LIABILITY  
14 GARY FUNG, *et al.*, ) [265]  
15 Defendants. )  
16 \_\_\_\_\_ )  
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19 The Court currently has under consideration Plaintiffs' Motion for  
20 Summary Judgment on Liability. The Court has considered Plaintiffs'  
21 Notice of New Pertinent Authority submitted on July 14, 2009. The  
22 Court finds the opinion relevant, and notes that the court in Arista  
23 Records LLC v. Usenet.com, Inc., found "uncontroverted evidence"  
24 showing direct infringements of the plaintiffs' copyrights by third  
25 parties. Arista Records LLC v. Usenet.com, Inc., 07 Civ. 8822 (HB),  
26 slip op. at 27 (S.D.N.Y. June 30, 2009). In that case, the  
27 "uncontroverted evidence" was supported both by the evidentiary record  
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1 and through operation of an adverse inference against the defendants on  
2 account of defendants' bad faith spoilation of data. Id.

3 In the present case Defendants Fung and Isohunt Web Technologies  
4 Inc. contend that Plaintiffs fail to provide sufficient evidence  
5 showing direct infringements of Plaintiffs' copyrights by third parties  
6 using Defendants' websites. (SGI, ¶ 2.)

7 For the reasons discussed below, before the Court issues its order  
8 on summary judgment, it would benefit from supplemental briefing and,  
9 if necessary, supplements to the record in order to determine whether  
10 third parties have used Defendants' websites to infringe Plaintiffs'  
11 copyrights.

12 When a party moves for summary judgment under Rule 56(c), that  
13 party bears the burden of affirmatively establishing all elements of  
14 its legal claim. See Southern Cal. Gas Co. v. City of Santa Ana, 336  
15 F.3d 885 (9th Cir. 2003) (per curiam) (adopting District Court order as  
16 its own). See also Fontenot v. Upjohn Co., 780 F.2d 1190, 1194 (5th  
17 Cir. 1986) ("[I]f the movant bears the burden of proof on an issue,  
18 either because he is the plaintiff or as a defendant he is asserting an  
19 affirmative defense, he must establish beyond peradventure *all* of the  
20 essential elements of the claim or defense to warrant judgment in his  
21 favor.") (emphasis in original). Under the Local Rules of this Court,  
22 the Court may base its judgment on the facts stated in the moving  
23 party's Statement of Uncontroverted Facts and Conclusions of Law, L.R.  
24 56-1, but only to the extent that the facts are "adequately supported  
25 by the moving party"-i.e., with evidence in the record-and  
26 uncontroverted by evidence submitted or identified by the opposition.  
27 L.R. 56-3.

1 In the present case, Plaintiffs assert that Defendants are liable  
2 for third parties' infringement of Plaintiffs' copyrights under  
3 theories of inducement, contributory infringement, and vicarious  
4 infringement. These theories of liability require Plaintiffs to  
5 provide evidence of direct infringement of Plaintiffs' copyright by  
6 third parties. See Perfect 10 v. Amazon.com, Inc., 508 F.3d 1146, 1169  
7 (9th Cir. 2007) (citing A&M Records, Inc. v. Napster, Inc., 239 F.3d  
8 1004, 1013 n. 2 (2001) ("Secondary liability for copyright infringement  
9 does not exist in the absence of direct infringement by a third  
10 party.")). In A&M Records, Inc. v. Napster, Inc. the Ninth Circuit  
11 explained that the prima facie case of direct infringement includes two  
12 specific elements: a showing of "ownership of the allegedly infringed  
13 material,"<sup>1</sup> and a demonstration "that alleged infringers violate at  
14 least one exclusive right granted to copyright holders under 17 U.S.C.  
15 § 106." 239 F.3d at 1013.

16 Implicit in the Napster court's reference to 17 U.S.C. § 106 is a  
17 further requirement at issue in the present case: that the infringement  
18 of Plaintiffs' copyrights occur inside the United States. The Ninth  
19 Circuit has determined that "United States copyright laws do not reach  
20 acts of infringement that take place entirely abroad." Subafilms, Ltd.  
21 v. MGM-Pathe Comm'ns Co., 24 F.3d 1088, 1098 (9th Cir. 1994) (en banc),  
22 *cert. denied sub nom. Subafilms, Ltd. v. United Artists Corp.*, 513 U.S.  
23 1001 (1994). As a later panel of that court wrote, "in order for U.S.  
24 copyright law to apply, at least one alleged infringement must be  
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27 <sup>1</sup>Note that in the present case Plaintiffs' ownership of various  
28 copyrights is uncontested. (SUF, ¶ 1.)

1 completed entirely within the United States." Allarcom Pay Television,  
2 Ltd. v. Gen'l Instrument Corp., 69 F.3d 381, 387 (9th Cir. 1995).

3 Since this jurisdictional question is an essential element of a  
4 copyright infringement claim, plaintiffs have the burden of alleging  
5 and proving that the infringement occurred in the United States. See,  
6 e.g., New Name, Inc. v. Walt Disney Co., CV 07-5034 PA (Rzx), 2007 U.S.  
7 Dist. LEXIS 97855, at \*5, 8-10 (C.D. Cal. July 25, 2008); Livingston v.  
8 Morgan, C-06-2389 MMC, 2007 U.S. Dist. LEXIS 55605, at \*16-17 & n. 5  
9 (N.D. Cal. July 25, 2007); Love v. The Mail on Sunday, CV 05-7798 ABC  
10 (PJWx), 2006 U.S. Dist. LEXIS 95456, at \*29 (C.D. Cal. Aug. 15, 2006);  
11 Safeair, Inc. v. Copa Airlines, CV04-5311RBL, 2006 U.S. Dist. LEXIS  
12 1146, at \*9 (W.D. Wash. Jan. 3, 2006); Kolbe v. Trudel, 945 F. Supp.  
13 1268, 1270 (D. Ariz. 1996).

14 Accordingly, this Court ORDERS Plaintiffs to file a supplemental  
15 brief discussing the evidence on the record showing third parties' use  
16 of Defendants' websites to infringe Plaintiffs' copyrights. If  
17 relevant evidence is not currently on the record, Plaintiffs are  
18 permitted to augment the record as necessary to establish that third  
19 parties have violated Plaintiffs' copyrights. Defendants are permitted  
20 to respond with a supplemental brief addressing Plaintiffs' submission  
21 by identifying any evidence currently on the record. Defendants may  
22 also augment the record if necessary to show genuine issues of material  
23 fact with respect to any evidence identified or submitted by  
24 Plaintiffs.<sup>2</sup>

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26 <sup>2</sup>This Order should not be construed as an invitation to the parties to  
27 engage in additional discovery. Nor should this order be construed  
28 as a response to Defendants' Fed. R. Civ. P. 56(f) arguments. (Opp.  
at 33-34, 38; Rothken Decl.) Defendants seek additional discovery  
of evidence relevant to the issues of knowledge, control,

1 The following briefing schedule and page limitations<sup>3</sup> apply to the  
2 requested materials:

- 3 • Plaintiffs' Supplemental Brief of no longer than six (6)  
4 pages to be filed by Tuesday, September 15, 2009.
- 5 • Defendants' Opposition to Plaintiffs' Supplemental Brief  
6 of no longer than six (6) pages to be filed by Tuesday,  
7 September 22, 2009.
- 8 • Plaintiffs' Reply Supplemental Brief of no longer than  
9 three (3) pages to be filed by Tuesday, September 29,  
10 2009.

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14 IT IS SO ORDERED.

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16 DATED: 8/25/09



STEPHEN V. WILSON  
UNITED STATES DISTRICT JUDGE

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24 materiality, substantial non-infringing uses, and inducement.  
25 (Rothken Decl.) The evidence Defendants are seeking is irrelevant to  
26 the issues addressed in this Order. This Order relates solely to the  
sufficiency of Plaintiffs' evidence in establishing Plaintiffs' prima  
facie case of third party copyright infringement.

27 <sup>3</sup> If the parties deem it necessary to augment the record, the stated  
28 page limitations do not apply to any additional evidence submitted to  
the Court.